



Final Regulation Agency Background Document

Agency name	Board of Dentistry, Department of Health Professions
Virginia Administrative Code (VAC) citation	18VAC60-20-10 et seq.
Regulation title	Regulations Governing the Dental Practice
Action title	Recovery of administrative costs in disciplinary actions
Date this document prepared	4/22/11

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 14 (2010) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

Brief summary

Please provide a brief summary (no more than 2 short paragraphs) of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed. Alert the reader to all substantive matters or changes. If applicable, generally describe the existing regulation. Also, please include a brief description of changes to the regulation from publication of the proposed regulation to the final regulation.

In a new section 18, the board has set out the conditions and procedures for assessment of disciplinary costs relating to investigation and monitoring of a licensee for whom there is a finding that a violation of law or regulation has occurred. The hourly costs for an investigation or for monitoring will be set out annually in a guidance document, and then, costs will be calculated for each case and assessed as a part of an order. Costs for monitoring and investigation could not exceed the statutory limit of \$5,000.

Statement of final agency action

Please provide a statement of the final action taken by the agency including (1) the date the action was taken, (2) the name of the agency or board taking the action, and (3) the title of the regulation.

On April 22, 2011, the Board of Dentistry adopted final action on 18VAC60-20-10 et seq., Regulations Governing the Dental Practice.

Legal basis

Please identify the state and/or federal legal authority to promulgate this proposed regulation, including (1) the most relevant law and/or regulation, including Code of Virginia citation and General Assembly chapter number(s), if applicable, and (2) promulgating entity, i.e., agency, board, or person. Describe the legal authority and the extent to which the authority is mandatory or discretionary.

Regulations are promulgated under the general authority of Chapter 24 of Title 54.1 of the Code of Virginia. Section 54.1-2400, which provides the Board of Dentistry the authority to promulgate regulations to administer the regulatory system:

§ 54.1-2400 -General powers and duties of health regulatory boards

The general powers and duties of health regulatory boards shall be:

- 1. To establish the qualifications for registration, certification or licensure in accordance with the applicable law which are necessary to ensure competence and integrity to engage in the regulated professions.*
- 2. To examine or cause to be examined applicants for certification or licensure. Unless otherwise required by law, examinations shall be administered in writing or shall be a demonstration of manual skills.*
- 3. To register, certify or license qualified applicants as practitioners of the particular profession or professions regulated by such board.*
- ...*
- 6. To promulgate regulations in accordance with the Administrative Process Act (§ 9-6.14:1 et seq.) which are reasonable and necessary to administer effectively the regulatory system. Such regulations shall not conflict with the purposes and intent of this chapter or of Chapter 1 (§ [54.1-100](#) et seq.) and Chapter 25 (§ [54.1-2500](#) et seq.) of this title. ...*

Specific regulatory authority for the Board of Dentistry is found in Chapter 89 of the 2009 Acts of the Assembly:

§ [54.1-2708.2](#). Recovery of monitoring costs.

The Board may recover from any licensee against whom disciplinary action has been imposed reasonable administrative costs associated with investigating and monitoring such licensee and confirming compliance with any terms and conditions imposed upon the licensee as set forth in the order imposing disciplinary action. Such recovery shall not exceed a total of \$5,000. All administrative costs recovered pursuant to this section shall be paid by the licensee to the Board. Such administrative costs shall be deposited into the account of the Board and shall not constitute a fine or penalty.

Purpose

Please explain the need for the new or amended regulation. Describe the rationale or justification of the proposed regulatory action. Detail the specific reasons it is essential to protect the health, safety or welfare of citizens. Discuss the goals of the proposal and the problems the proposal is intended to solve.

The purpose of this regulatory action is to initiate rules for recovery of administrative costs relating to the investigation and monitoring of a licensee disciplined by the Board of Dentistry. Legislation passed by the 2009 General Assembly (HB2058) provides statutory authorization for imposition of such costs, and the goal of the amendments is to establish the regulatory framework for which costs may be assessed, how those costs may be determined, the process for assessment of costs.

Enforcement activities constitute the largest expenditure for the board, although only a small percentage of licensees undergo investigation, and an even smaller percentage are found to be in violation of statutes and regulations governing their professions. Therefore, it is equitable to assess at least a portion of enforcement and monitoring costs to those who are the cause of the expenditure. By recovering a portion of its enforcement costs, the board will be better able to meet its obligation to investigate every complaint it receives and to more efficiently and effectively resolve cases related to patient care. The board will have the additional resources necessary to adequately investigate reports of misconduct to make the practice of dentistry and dental hygiene safer for patients in Virginia.

Substance

Please identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. A more detailed discussion is required under the "All changes made in this regulatory action" section.

The statute is specific about some aspects of the authority to recover "reasonable administrative costs associated with investigating and monitoring" a licensee. The recovery of costs will only be implemented if a licensee has had disciplinary action imposed. It will not affect those licensees: 1) who are investigated by the Department, but for whom no probable cause is found to indicate a violation may have occurred; 2) who have a disciplinary proceeding, but for whom no violation is found and no discipline imposed; or 3) who have matters resolved through a confidential consent agreement or an advisory letter.

Rather than setting specific fees or dollar amounts in regulation, the amendments provide a process for determination of both the investigative and monitoring costs, as specified in the Code section. At the end of each fiscal year, regulations require a calculation of the average hourly cost for enforcement that is chargeable to the work of the Board of Dentistry. The Enforcement Division of the Department tracks the number of hours an investigator spends on a case, so that number could be multiplied by the hourly cost to determine the specific costs relating to the investigation of the case against a specific respondent. In addition, the board would assess any

costs relating to hiring expert witnesses and the reports generated by such witnesses. While not inclusive of all related administrative costs, a fee based on the actual number of hours and the hourly cost of an investigation would be reasonable and not arbitrary or selectively punitive. The imposition of the recovery cost would become part of the order from an informal or formal proceeding or part of a consent order agreed to by the parties.

The monitoring costs would be calculated based on the terms and conditions imposed and the length of time the licensee is to be monitored. As with the enforcement costs, the board would annually calculate the average costs of monitoring certain terms, such as the acquisition of continuing education in an area of practice. If the licensee is to be monitored beyond one year, the monitoring cost would be imposed for each of those years. A guidance document would be adopted annually setting out the average investigative and monitoring cost (for the various terms and conditions to be monitored), so the licensees (and their attorneys, if applicable) would have knowledge of the recovery of costs, if disciplinary action is imposed. Since the costs would be incorporated in the order, the respondent would have the option to accept the order, request a formal hearing following an informal, or appeal an order from a formal hearing to a circuit court. As specified in statute, the total of the recovery of costs could not exceed \$5,000. However, the regulations will reference current fees for inspection of dental offices and returned checks as fees not subject to the recovery maximum. Additionally, the board may seek to recover the collection costs for delinquent fines and fees.

Issues

Please identify the issues associated with the proposed regulatory action, including:
1) *the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions;*
2) *the primary advantages and disadvantages to the agency or the Commonwealth; and*
3) *other pertinent matters of interest to the regulated community, government officials, and the public. If there are no disadvantages to the public or the Commonwealth, please indicate.*

-
- 1) The primary advantage to the public would be that income generated by the partial recovery of disciplinary costs may allow the board to sustain its investigative, adjudication, and monitoring activities without substantial increases in fees charged to licensees who are not in violation of law and regulation. There are no disadvantages.
 - 2) The primary advantage to the agency is the creation of a new source of revenue to offset ever increasing costs relating to the disciplinary functions of the board. There are no disadvantages, but the agency will have an increased responsibility for collection of assessed costs.
 - 3) There are no other pertinent matters.

Changes made since the proposed stage

Please describe all changes made to the text of the proposed regulation since the publication of the proposed stage. For the Registrar’s office, please put an asterisk next to any substantive changes.

There were no changes made to the text of the proposed regulations.

Public comment

Please summarize all comments received during the public comment period following the publication of the proposed stage, and provide the agency response. If no comment was received, please so indicate.

Proposed regulations were published in the Virginia Register of Regulations on January 3, 2011. Public comment was requested for a 60-day period ending March 4, 2011. A public hearing was held on February 25, 2011.

Written comment was received from Walter Saxon, DDS. The comment is summarized as follows:

- Should have procedures in place to ensure that time being charged for investigation is productive.
- Costs for bogus or revenge complaints should not be included in calculation.
- Concern that the bureaucracy will do whatever to protect itself.

Board response:

There is an ongoing review of employee performance; procedures are in place to ensure investigative time is appropriately allocated. The Board will seek recovery of some costs in only those cases in which a violation was found; therefore no “bogus or revenge” complaints will result in costs to the practitioner.

Electronic comment was received on Townhall from a Dr. in Portsmouth noting that the falsely alleged party should have ability to charge for the hourly wage to defend an inappropriate charge.

Board response:

The Board will seek recovery of some costs in only those cases in which a violation was found; therefore no unfounded complaints will result in costs to the practitioner.

All changes made in this regulatory action

Please list all changes that are being proposed and the consequences of the proposed changes. Describe new provisions and/or all changes to existing sections.

Proposed new section number, if applicable	Proposed change, rationale, and consequences
18	Subsection A sets out the procedure for assessment of cost for investigation of a disciplinary case.

	<p>1. In any disciplinary case in which there is a finding of a violation against a licensee or registrant, the board may assess the hourly costs relating to investigation of the case by the Enforcement Division of the Department of Health Professions and, if applicable, the costs for hiring an expert witness and reports generated by such witness.</p> <p><i>Consistent with the law, the costs of an investigation would only be assessed if there is a finding of a violation. Costs would be determined by the number of hours an investigator stipulates he or she has spent on a particular case. Currently, the allocated share for the Board of Dentistry of enforcement costs within the Department is calculated on the usage of enforcement resources – primarily the hours of investigator time dedicated to Dentistry cases. Additionally, the board may incur costs relating to an expert witness (hourly rate plus expenses for preparation of documents from such a witness).</i></p> <p>2. The imposition of recovery costs relating to an investigation shall be included in the order from an informal or formal proceeding or part of a consent order agreed to by the parties. The schedule for payment of investigative costs imposed shall be set forth in the order.</p> <p><i>Since the costs relating to an investigation would be known prior to a proceeding, those costs can be included in the order, along with a schedule for payment of costs. If a respondent disagrees with any part of the order (including the imposition of costs), he or she has the option of appealing the finding of an informal conference to a formal hearing conducted by the board or, if the order came from a formal hearing, the respondent has the option of appealing to a circuit court.</i></p> <p>3. At the end of each fiscal year, the board shall calculate the average hourly cost for enforcement that is chargeable to investigation of complaints filed against its regulants and shall state those costs in a guidance document to be used in imposition of recovery costs. The average hourly cost multiplied times the number of hours spent in investigating the specific case of a respondent shall be used in the imposition of recovery costs.</p> <p><i>By annually issuing a guidance document with hourly costs set out, the imposition of costs will be less arbitrary. The hourly cost will be known in advance, so the board will only have to use the number of hours reported by the investigator to calculate the investigative costs that may be assessed.</i></p> <p>Subsection B sets out the procedure for assessment of cost for monitoring a licensee or registrant.</p> <p>1. In any disciplinary case in which there is a finding of a violation against a licensee or registrant and in which terms and conditions have been imposed, the costs for monitoring of a licensee or registrant may be charged and shall be calculated based on the specific terms and conditions and the length of time the licensee or registrant is to be monitored.</p> <p>2. The imposition of recovery costs relating to monitoring for compliance shall be included in the board order from an informal or formal proceeding or part of a consent order agreed to by the parties. The schedule for payment of monitoring costs imposed shall be set forth in the order.</p>
--	---

	<p>3. At the end of each fiscal year, the board shall calculate the average costs for monitoring of certain terms and conditions, such as acquisition of continuing education, and shall set forth those costs in a guidance document to be used in the imposition of recovery costs.</p> <p><i>The methodology for calculation of cost for monitoring is similar to that for investigative cost. Those costs will be established in advance in an annual guidance document and will be calculated on the amount of staff time and other costs relating to monitoring of a respondent under terms and conditions set out in a disciplinary order. The costs will be annualized and multiplied by the amount of time a respondent is to be monitored.</i></p> <p>Subsection C sets out the total of the assessment that may be imposed.</p> <p>In accordance with § 54.1-2708.2 of the Code of Virginia, the total of recovery costs for investigating and monitoring a licensee or registrant shall not exceed \$5,000, but shall not include the fee for inspection of dental offices and returned checks as set forth in 18VAC60-20-30 or collection costs incurred for delinquent fines and fees.</p> <p><i>The Code section authorizing recovery of disciplinary costs sets a limit of \$5,000, so that limit is repeated in regulation. The fees for inspection of dental offices (sometimes required in an order) and for returned checks are already establishes in regulation, so those fees may be additionally imposed as necessary. Likewise, costs relating to collection of such funds may be added in delinquency charges. In the fiscal impact statement on the legislation (HB2058), it was reported that the average cost for enforcement, administrative proceedings and the Office of the Attorney General is \$3,153 per case, so the \$5,000 seems reasonable. The assessment will not include costs for the Attorney General, for scheduling and conducting a proceeding, for administrative proceedings hourly rate for preparation of document, staff time or board member expenses for attendance at hearings.</i></p>
--	---

Regulatory flexibility analysis

Please describe the agency’s analysis of alternative regulatory methods, consistent with health, safety, environmental, and economic welfare, that will accomplish the objectives of applicable law while minimizing the adverse impact on small business. Alternative regulatory methods include, at a minimum: 1) the establishment of less stringent compliance or reporting requirements; 2) the establishment of less stringent schedules or deadlines for compliance or reporting requirements; 3) the consolidation or simplification of compliance or reporting requirements; 4) the establishment of performance standards for small businesses to replace design or operational standards required in the proposed regulation; and 5) the exemption of small businesses from all or any part of the requirements contained in the proposed regulation.

There are no alternative regulatory methods to accomplish the intent of the statutory language.

Family impact

Please assess the impact of the proposed regulatory action on the institution of the family and family stability including to what extent the regulatory action will: 1) strengthen or erode the authority and rights

of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one's spouse, and one's children and/or elderly parents; 3) strengthen or erode the marital commitment; and 4) increase or decrease disposable family income.

There is no impact on the family.